

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ARTHUR LEE ALFRED, II, et al.,

Plaintiff,

v.

WALT DISNEY PICTURES,

Defendant.

Case No. 2:18-CV-08074-CBM-ASx

**[PROPOSED] ORDER
SUSTAINING PLAINTIFFS'
EVIDENTIARY OBJECTIONS**

Date: October 19, 2021
Time: 10:00 a.m.
Dept: Courtroom 8B
Judge: Hon. Consuelo Marshall

Having considered Plaintiff Lee Alfred II and Ezequiel Martinez's Evidentiary Objections, IT IS HEREBY ORDERED THAT:

1. The declarations of David Jessen, Diego Parras, and Rebecca Cline are STRICKEN. Federal Rule of Civil Procedure 26(a) requires parties to identify its witnesses and supporting evidence with particularity. Defendant Walt Disney Co. failed to do so. Federal Rule of Civil Procedure 37 therefore prohibits use of any undisclosed evidence—here, the declarations and corresponding exhibits of Jessen, Parras, and Cline—at any hearing or in connection with motion.
2. The expert report of James McDonald is STRICKEN. Federal Rule of Evidence 702 requires courts to exercise its gatekeeping authority to prevent unreliable opinions from reaching the trier of fact. Here, Mr. McDonald's testimony is not sufficiently reliable under Rule 702(c) because Mr. McDonald did not apply the selection and arrangement analysis applicable to this matter when comparing Plaintiffs' screenplay to Defendants' film. There is further insufficient evidence that Mr. McDonald's opinion will be helpful to the trier of fact under Rule 702(a), because he applied a novelty-type

analysis. Permitting Mr. McDonald to testify as to matters of novelty will confuse the jury on issues of substantial similarity.

3. Exhibit D to the Gray Declaration is STRICKEN. This District's Local Rules require litigants to place their arguments in a memorandum of points and authorities and to submit evidentiary matters in declarations. *See* C.D. Cal. R. 7-5, 7-7. Exhibit D is incorporated by reference in Disney's memorandum, making it an argument. Because arguments belong in memoranda and not in declarations, the comparison is not proper under the District's Local Rules.
4. The following facts from Disney's Statement of Undisputed Material Facts are EXCLUDED:

- a. Facts 1-16, 95-99, 117-39, 171, 177-78, 181, and 183 are EXCLUDED. Only material facts may be cited. C.D. Cal. R. 56-1. But comparisons of the Disney ride to the *Pirates* screenplay are "not material" to whether the *film* is similar to the *Pirates* screenplay. (Answering Brief at 5, *Alfred v. Walt Disney Co.*, No. 19-55669 (9th Cir. Dec. 20, 2019) (Dkt. 28).) Since immaterial facts are irrelevant, they will be excluded under Rule of Evidence 402 pursuant to Federal Rule of Civil Procedure 56(c)(2).
- b. Facts 17-18, 20, 25-26, 29, 31-46, 49-53, 55-56, 58-59, 61-81, 84-86, 88, 100, 103, 152, and 159 are EXCLUDED. It is immaterial whether there are differences between the original and accused infringing work; only similarities are material. *L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 852 (9th Cir. 2012); *see also* 4 Nimmer on Copyright § 13.03. Each fact here purports to cite *differences* between the *Pirates* screenplay and film, which is immaterial to the question of substantial similarity. Since immaterial facts are irrelevant, they will

1 be excluded under Rule of Evidence 402 pursuant to Federal Rule of
2 Civil Procedure 56(c)(2).

3 c. Facts 96-97, 100-123, 125, 129-31, and 133-39 are EXCLUDED. In
4 the Ninth Circuit, amended complaints supersede any former
5 complaints. *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992).
6 Disney's citation, then, to the first, original complaint cites to materials
7 not in evidence. As materials not in evidence are not evidence at all,
8 any reference to them is by definition irrelevant. The facts will be
9 excluded under Federal Rule of Evidence 402.

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11 SO ORDERED this ____ day of _____, 2021.

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14 Hon. Consuelo B. Marshall
15 District Judge
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